IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No.1365 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHAH GUNVANTLAL PUNAMCHAND HINDU, THRO'HIS POWER OF ATTO.

Versus

PATEL SAKATIBEN BACHUBHAI

Appearance:

1. First Appeal No. 1365 of 1989

MR KG PANDIT for Appellant No. 1-1/1

MR MAHENDRA K PATEL for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 17/10/2002

ORAL JUDGEMENT

1. The respondent was the original plaintiff in Special Civil Suit No.36 of 1987 in the Court of Civil Judge (S.D.), Mehsana. She had filed the said suit alleging that on 31-03-1986, 01-05-1986 and 01-10-1986,

the defendant had been paid Rs.10,000/=, Rs.8,000/= and Rs.12,500/= respectively and had also executed a promissory note. Since the defendant failed to pay the amount after demand, the plaintiff filed the suit to recover the same.

2. The defendant filed his written statement at Exh.19, resisting the said suit. He did not admit that he had received any amount, as alleged, on the aforesaid dates and that he had executed any promissory note. According to him, he had taken an amount of Rs.8,000/= in the year 1980 but he had been unable to pay the amount due to circumstances beyond his control and the plaintiff calculated the amount by compounding interest and filed a false suit which was time barred.

3. After raising the issues, which arose from the pleadings of the parties, the learned trial Judge recorded evidence led by the parties. The plaintiff gave evidence at Exh.27. It appears that before the suit came up for trial, the defendant had left India for U.S.A. after executing a Power-of-Attorney in favour of his wife. The wife gave evidence on behalf of the defendant at Exh.39. She denied that any amount, as alleged, had been paid by the plaintiff. However, she did not know that any promissory note had been executed. In the cross-examination she stated that she knew the signature of her husband and that the signature on the promissory note looked like that of her husband. She stated that the signature had been obtained under intimidation. She stated that she was not present at the time when threats were given. The learned Judge believed the evidence of the plaintiff and held that it was proved that a sum of Rs.30,500/= was due from the defendant. He also held that the suit was within the period of limitation. He also held that it was not proved that the promissory note had been taken under threat and was without consideration. He, therefore, passed the decree for Rs.30,601/-, which included the amount of Rs.101/- as notice charges with interest at 9%. He also restrained the defendant from transferring the property bearing Nos.2/150 and 2/151 of village Vadu till the satisfaction of the decretal amount.

4. The original defendant has filed the appeal through his wife, who is the Power-of-Attorney holder, challenging the said judgement and decree.

5. The learned counsel for the appellant read the judgement and the evidence of the witnesses. However, it is not shown how the findings recorded by the learned

trial Judge were erroneous. In the circumstances of the case, the learned trial Judge was perfectly justified in believing the evidence of the plaintiff and passing the decree in his favour. On merits, there is no substance in the appeal. However, the learned counsel for the appellant contended that the learned Judge erred in granting permanent injunction restraining the defendant from transferring the properties. It appears that the plaintiff had given an application for attachment before judgement under Order 38 Rule 5 of the Civil Procedure Code. The prayer for attachment was not granted but the learned Judge had granted temporary injunction to restrain the defendant from transferring the properties mentioned in the application. In the course of his judgement the learned trial Judge observed, in para 12, that the property No.2/151 was in the name of the defendant and property No.2/150 was in the name of the defendant's wife. In the plaint, there was no prayer for permanent injunction, and no issue was raised as to whether the plaintiff was entitled to permanent injunction to restrain the defendant from transferring any of the properties. One of the properties stood in the name of the defendant's wife. The learned trial Judge was, therefore, in error in granting permanent injunction in the absence of any prayer for the same.

6. If any property is sought to be attached and sold in execution of a decree as belonging to the defendant, and if any objection is raised by the defendant's wife to the effect that the property belongs to her and not to the defendant, it is for the executing Court to decide the said question, but the trial Judge was in error in passing the decree for permanent injunction in absence of any prayer and issue as to the same, and hence, that part of the decree is liable to be set aside.

7. The appeal, therefore, partly succeeds. The decree for permanent injunction restraining the defendant from transferring properties bearing Nos.2/150 and 2/151 of village Vadu till the satisfaction of the decretal amount is set aside. The rest of the decree is confirmed. No order as to costs. Sd/-

[M.C.PATEL, J]

'Bhavesh'